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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-495

KAKE-TV AND RADIO, INC.,

Petitioner,

vs.

**UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION,**

Respondents,

**AIRCAPITAL CABLEVISION, INC. AND THE
CITY OF WICHITA, KANSAS,**

Intervenors.

**BRIEF IN OPPOSITION BY INTERVENOR,
THE CITY OF WICHITA, KANSAS**

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The City of Wichita, Kansas, was not a party to the CATV compliance proceeding before the Federal Communications Commission, but did intervene in the Court of Appeals on KAke's Petition to Review the Commission grant of a certificate of compliance to AirCapital. However, the City did make known its view to the FCC that AirCapital's CATV franchise granted in 1969, and later amended, was unquestionably valid and that the grant of a certificate of compliance was in the best interests of the citizens of Wichita. (R. 121, 225).

We have had the opportunity to review the Brief in Opposition being filed by AirCapital. We give our

unqualified support to the statements and arguments there presented, and will not engage in needless repetition.

We do, however, wish to emphasize the important public interest supporting the FCC Order below which granted AirCapital the certificate of compliance. This public interest is in part reflected by the Kansas legislature's enactment of K.S.A. 12-2006, et seq. (enacted March 24, 1972), declaring that CATV service is affected with a public interest, empowering cities to regulate its activities to the extent that CATV operation affects local interests.

K.S.A. 12-2012, a part of the foregoing enactment, was intended to validate previously granted CATV franchises, because of the legal confusion theretofore existing on the point. That statute provides:

"All ordinances and existing franchises purporting to authorize persons or entities to provide cable television service in said cities shall hereinafter be deemed to be authorized and operative under the provisions of this act."

Counsel for the City of Wichita and other municipalities had personally appeared before the Kansas Senate Committee prior to enactment of these statutes, and supported the legislation. The Committee was advised that Wichita had granted a franchise in 1969 to AirCapital. Thus, the legislature, in enacting the foregoing statutes, was fully aware that its action, in declaring existing franchises to be authorized and operative under the provisions of the Act, had the effect of recognizing as valid the very 1969 franchise which is the subject of this case.

We take note of KAKE's contention that the FCC should have decided, under state law, the question of whether AirCapital's franchise was valid if AirCapital

were the highest bidder among the four competing applicants for a franchise.

We do not deem it necessary to delineate the circumstances in which a franchise granted on the basis of a "high bid" may invalidate a franchise under Kansas law. We must agree with the FCC, and with the Court of Appeals, that it is not the function of the FCC as an administrative agency, having only those powers delegated to it under the Communications Act, to rule upon the validity of franchise-contracts under state law. *Regents of Georgia v. Carroll*, 338 U.S. 586, 602, 94 L.Ed. 363, 375-376 (1950).

Moreover, a city staff analysis of the competing bids, as well as a complete study by an independent private concern, revealed that, while AirCapital's proposal was not the highest bid, it was the best so far as the public interest and the citizens of Wichita were concerned. (R. 171). Although not a part of the printed Record here, the Commission Record included the filing of the Record on Appeal in *KAKE-TV and Radio, Inc. v. City of Wichita*, 213 Kan. 537, 516 P.2d 929, with the FCC in the proceeding below. An analysis of the various proposals dated November 26, 1968, commences on page 73 of that Record. No evidence in the form of affidavit or otherwise was presented to the contrary.

Thus, any assertion that AirCapital gained a franchise because it was the highest bidder is without support in fact. It is contrary to the facts, which are shown in the Record.

For these reasons, it becomes apparent that petitioner KAKE does not present any substantial question justifying review by this Court.

The Petition for Certiorari should be denied.

Respectfully submitted,

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